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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

FOR THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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GEORGE DELACRUZ,
PETITIONER

VS.

STATE OF TEXAS,
RESPONDENT

PETITIONER'S MOTION FOR REHEARING OF THE DECISION AFFIRMING THE JUDGMENT OF THE THIRD COURT OF APPEALS CAUSE NO. 03-15-00302-CR

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GROUND FOR REHEARING NUMBER ONE

THE OPINION OF THE COURT OF CRIMINAL APPEALS CONTAINS ERRORS IN ITS NARRATIVE OF THE FACTS AND OMITS OTHER KEY FACTS THAT SHOW THAT THE ALLEGED VICTIM WAS ALIVE AFTER THE SUPPOSED TIME OF DEATH.

The opinion of the Court of Criminal Appeals contains many errors in its rendition of the facts. The Court bases its finding that the evidence is sufficient to support Petitioner's murder conviction on these erroneous factual statements and refers to these erroneous statements of fact throughout its opinion. These factual misstatements are the basis for the Court's final decision in the case and Petitioner would ask the Court to re-examine the case with a correct version of the facts. Here are the main factual misstatements in the opinion:

FACTUAL MISTATEMENT NO. 1 - slip opinion p. 11 – "There was also evidence that he dug a hole designed to bury a human body, that cadaver dogs alerted near this hole, and that something had been burned near the hole." **This sentence is full of errors.**

First, there was no evidence that Petitioner dug the hole. During his questioning of Detective Rogelio Sanchez the lead detective on the case, Prosecutor Gary Cobb tried to insinuate that the trench found underneath the flooring of the shed was dug by Petitioner to bury a body in. (R.R. VI, pp. 303-304) But on recross-examination, Sanchez testified as

follows:

> "Q. But you have no evidence whatsoever linking that trench to George DeLaCruz; isn't that right?
>
> "A. That's correct." (R.R. VI, p. 304)

Detective Sanchez repeated this answer again on recross – that police had no evidence linking the trench in the shed to Petitioner. (R.R. VI, p. 304)

Second, there was no evidence the hole was designed to bury a human body. The hole[1] or trench was not big enough to bury a body in. In addition, the trench was under the flooring of a shed in the backyard and was criss-crossed by joists that supported the flooring of the shed. Austin Police Department Crime Scene Specialist Victor Ceballos testified that he measured the trench and it was 5 ft long, 1 ½ ft. deep and 2 ft. wide. (R.R. V, pp. 149) Detective John Brooks who responded to the scene as a patrol officer testified he believed the trench to be approximately 4 ft. long and 2 ft. deep. (R.R. IV, p. 132) There was no way a body could have been put into the trench between the joists. State's Exhibit 84 is a photo of the trench:

[1] At trial the witnesses described it as "a trench."

A review of all the evidence which concerned the trench showed that the police performed no forensic examination of the trench. They did not dig it up and they did no testing for blood, DNA, or any other forensic evidence. They merely photographed it. Throughout the trial the State kept talking about the trench as if it was the burial spot but there was no evidence to support such a theory. Petitioner would remind the Court that there must be evidence to support an inference and there was absolutely

no evidence to support the inference that this trench was designed to be the burial spot for the body of the alleged victim.

Third, there was no testimony during the trial about cadaver dogs alerting near this trench. Petitioner has searched the record for all mention of cadaver dogs in the record. There were three instances in the record where there was testimony about cadaver dogs and a review of those three instances show that there was never any testimony that the cadaver dogs alerted near the trench. The first instance occurred during the defense cross-examination of Crime Scene Specialist, Victor Ceballos:

> "Q. Okay. Were there dogs on the scene?
>
> "A. I did – I believe there was one pup at the scene that I saw.
>
> "Q. I'm talking about cadaver dogs.
>
> "A. Oh, yes, sir.
>
> "Q. Okay. Did they go in that shed?
>
> "A. I didn't see them personally go into that shed, sir, but I was directed by Detective Sanchez, because it was starting to rain, there were some items that were out there that they wanted collected before the rain and that the cadaver dogs had sniffed at and were an item of interest." (R.R. V, pp. 154-155)

The second instance occurred during the cross examination of lead detective Rogelio Sanchez:

> "Q. Did you use a dog during the search warrant?

"A. Yes, sir.

"Q. Did you direct how – the dog handlers how to use that dog?

"A. I don't – we don't get involved in that. The handlers – as we are not really familiar with the dogs themselves, we can't direct, you know, their activity." (R.R. VI, p. 293)

The last instance occurred during the redirect examination of Detective Sanchez:

"Q. The defense attorney asked you about the cadaver dogs that were out at the scene. Did those dogs alert on anything at 5809 Garden Oaks?

"A. Yes, sir.

"Q. But would it be fair to say that, given the circumstances and the timing of this warrant being served over a month after Julie Ann Gonzalez was last seen, that you didn't give a lot of weight to a cadaver dog alerting on that scene at 5809 Garden Oaks?

"A. That's true.

"Q. But the dogs did alert, didn't they?

"A. Yes, sir. (R.R. VI, pp. 299-300)

There was absolutely no testimony at trial that the cadaver dogs had alerted anywhere near the trench in the shed. As shown above, there was no evidence that the dogs were even taken into the shed. The evidence did show that the dogs alerted to something at that address but the record does not reflect if this was in the front yard, in the house or in the backyard.

In addition, this would not have been unusual in that the alleged victim had resided at that address when she was married to Petitioner. (R.R. III, pp. 182-184, 224)

FACTUAL MISTATEMENT NO. 2 - slip opinion p. 24 - "The hole was five feet wide, five feet long and two feet deep. . . . Cadaver dogs alerted at Delacruz's house and sniffed some items in the shed, but no body was found."

First, this is an inaccurate statement of the measurements of the trench as shown above. The undersigned attorney worked at the Court of Criminal Appeals for six and one/half years first as a briefing attorney and then as a research attorney for Judge Michael McCormick. She cannot imagine writing an opinion and being so careless in the rendition of the facts as has been done in Petitioner's case. The opinion recites exact measurements of the trench but as shown above, these are not the measurements which were testified to during Petitioner's trial. Austin Police Department Crime Scene Specialist Victor Ceballos testified that he measured the trench and it was 5 ft long, 1 ½ ft. deep and 2 ft. wide. (R.R. V, pp. 149) Detective John Brooks who responded to the scene as a patrol officer testified he believed the trench to be approximately 4 ft. long and 2 ft. deep. (R.R. IV, p. 132)

Second, there was no testimony during the trial that the cadaver dogs sniffed some items in the shed. As shown above, cadaver dogs were brought to the address of the house where Petitioner lived with his mother and sisters. But there was no testimony that the dogs were ever taken into the shed.

FACTUAL MISTATEMENT NO. 3 - slip opinion p. 24 – "This digging apparently damaged telecommunication cables."

A thorough reading of the record shows that the damage to the telecommunication cables was in no way related to the trench dug under the shed. A review of the evidence shows that the damage to the telecommunication cables was in an area of the yard in back of the shed. The area where the telecommunication cables were damaged was directly under a woodpile, so if the cables were damaged by anyone, they would have had to move the woodpile and dig down to where the cables were buried. (R.R. VI, pp. 114-139) There was no testimony whatsoever tying the damage to the telecommunications cables to the trench in the shed. Again, this is an erroneous misstatement of the facts designed to bolster the evidence against Petitioner.

FACTUAL MISTATEMENT AND OMISSION NO. 4 – slip opinion p. 23- "A cashier working that night remembered a woman coming into the store, saying that she had car trouble, and asking if she could leave her car in the parking lot overnight. The cashier was unable to identify the woman from a series of photographs culled from store surveillance during that period."

Robert Guerra, the Walgreen's cashier, testified that he was working at the Walgreen's store on S. 1st and Stassney on the Friday night of the day the alleged victim disappeared. He testified that a lady came into the store sometime between 10:00 p.m. and 1:30 a.m. and said she was having car problems and asked if she could leave her car in the store parking lot. He told her that she could leave her car there and at one point during his shift Guerra went out and looked at the car. (R.R. IV, pp. 88-95) It was later identified as the alleged victim's car. The opinion omits a very important fact. Guerra testified that about a week after the car was discovered in the parking lot, the alleged victim's mother came into the store and showed him a picture of the alleged victim. Guerra testified that he remembered that that was the girl who had come into the store. He testified at Petitioner's trial that the picture looked just like the lady who had left her car at the store. Guerra testified that police showed him pictures from the surveillance video and he told them that one of the pictures they showed him kind of resembled

her. (R.R. IV, pp. 98-114) The opinion erroneously leaves the impression that Guerra never identified the woman in the store as the alleged victim but as can be seen from a review of the testimony that is not true. He identified a picture of the alleged victim shown to him by the alleged victim's mother as the woman who left the car in the store parking lot. This is crucial because according to the State's theory of the case, this event occurred after Petitioner supposedly killed the victim. This evidence showed that the alleged victim was not dead but was in fact alive after the time the State is asserting that Petitioner killed her. The fact that this factual error and omission is a part of the opinion from the Court is quite disturbing and again demonstrates the need for rehearing in this case.

The inaccuracies in the Court's rendition of the facts are alarming especially when the Court's opinion relies on those inaccuracies in finding the evidence sufficient. Petitioner would assert that where the Court has misconstrued the evidence, erroneously set out the evidence in its opinion, and omitted key evidence in its discussion, the inferences from the use of that erroneously construed evidence are not reasonable and should not be used to support a finding that the evidence is sufficient to support his conviction. Petitioner deserves a fair review of his case based on an accurate reading of the facts and he would ask the Court to grant rehearing in this case.

GROUND FOR REHEARING NUMBER TWO

IN ITS OPINION AFFIRMING PETITIONER'S CONVICTION, THE COURT OF CRIMINAL APPEALS HAS EFFECTIVE "LEGISLATED" AWAY THE BEDROCK OF OUR CRIMINAL JUSTICE SYSTEM BY TELLING THE STATE IT NO LONGER HAS TO PROVE THE ELEMENTS OF THE OFFENSE OF MURDER IN ORDER TO OBTAIN A CONVICTION.

A basic premise of criminal law is that due process requires that before a defendant can be convicted of an offense, the State must prove the elements of the offense as alleged in the indictment. Jackson v. Virginia, 443 U.S. 307, 313, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). If the State fails to prove all of the elements of the offense as alleged in the indictment, the evidence is deemed to be insufficient.

When reviewing the sufficiency of the evidence to support a conviction, case law holds that the appellate court can view the evidence in the light most favorable to the verdict in its determination of whether the State has fulfilled its burden of proving the elements of the offense. Jackson v. Virginia, supra at 319. But that review must always center on the elements of the offense. The opinion of the Court of Criminal Appeals in Petitioner's case, basically holds that no longer must the State prove the elements of the offense – if things look suspicious enough – that will be sufficient.

To show that an offense has been committed, it has long been the principle that the State must prove the statutorily required *actus reus* and the

mens rea of the crime. See Ramirez-Memije v. State, 444 S.W.3d 624, 627 (Tex.Cr.App. 2014); Cook v. State, 884 S.W.2d 485, 487 (Tex.Cr.App. 1994). The definition of the elements of a criminal offense is entrusted to the legislature. Liparota v. United States, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985); United States v. Hudson, 11 U.S. 32, 7 Cranch 32, 3 L.Ed. 259 (1812). The Texas legislature has defined the elements of murder which the State was under a burden to prove in Petitioner's case. These were:

(1) Petitioner

(2) Intentionally or knowingly (*mens rea)*

(3) Caused the alleged victim's death (*actus reus*)

Or

(1) Petitioner

(2) Intending to cause her serious bodily injury (*mens rea)*

(3) Committed an act clearly dangerous to human life that caused her death. (*actus reus)* Texas Penal Code, Sec. 19.02(b)(1).

Petitioner asserts that even when correctly viewing the evidence adduced during his trial in the light most favorable to the verdict, no rational fact finder could pile inference on inference to find the elements of the offense as alleged in the indictment.

The opinion of the Court of Criminal Appeals finds the evidence sufficient based on three factors:

(1) the missing alleged victim and the absence of evidence to show her alive;

(2) circumstances which suggest that Petitioner was connected to her disappearance;

(3) evidence which the Court writes shows Petitioner's culpable mental state.

With respect to the second factor, as Petitioner has shown above, the opinion of the Court is full of factual inaccuracies. Whoever drafted the portion of the opinion dealing with the facts, either misread the record or was completely careless in their review and summary of the record. Petitioner asks for a full and complete and accurate review of the facts in his case.

With respect to the third factor, a review of the evidence which the Court uses to support its conclusion regarding Petitioner's culpable mental state in no way proves the requisite culpable mental state as alleged in the indictment. Motive does not prove culpable mental state. Neither does the alleged victim's prior statements of fear of the Petitioner. The State must prove a defendant's culpable mental state at the time of the offense. There was no such evidence adduced. The Court wrote:

> "a rational jury could also have interpreted Delacruz's admittedly cryptic statement that he was 'leaning toward [his] original plan' as a veiled expression of an intent to kill her. The hole dug in the shed in his back yard was further evidence of such preparations. In addition Delacruz engaged in an elaborate scheme to impersonate Julie in text messages and online to convey the impression that Julie had run away with another man. The ashes and burned clothing could be construed as an effort to cover up his crime." (slip opinion, p. 40)

But none of this shows Petitioner's culpable mental state at the time of the alleged offense. The statement referenced by the Court was made several weeks before the alleged victim disappeared – hardly an indicator of what Petitioner was thinking on the day of the alleged victim's disappearance. The statement about the hole dug in the shed is complete speculation. There is no evidence to show that the hole was dug before the alleged offense; nor is there any evidence to show that Petitioner dug the hole. The statement about Petitioner impersonating the alleged victim in text messages and online does not prove that if she is dead and Petitioner was somehow involved in her death that he acted intentionally or knowingly or with an intent to commit serious bodily injury. Rather, it is just as likely that if she died, it could have been the result of a negligent or reckless act that he could have been trying to cover up. Again, using Petitioner's alleged conduct that occurred after the alleged death to prove the requisite culpable mental state is total speculation and is not a reasonable inference.

Finally, although ashes were found in Petitioner's backyard and police speculated that the ashes might have been shoelaces or a drawstring, there was no forensic examination done on the ashes. Thus, there was no evidence adduced to show that there was burned clothing nor was there any evidence which showed that Petitioner was responsible for burning anything in his family's backyard. Additionally, there was no evidence to show when the fire which resulted in the ashes occurred. There was certainly no evidence that the fire occurred on the day of the alleged victim's disappearance. Again, the Court's rendition of the facts is inaccurate and the Court has drawn unreasonable and speculative inferences based on its erroneous understanding of the facts adduced at the trial. The bottom line is that such erroneous inferences do not support evidence of the culpable mental state required to convict Petitioner of murder.

The Court has totally abandoned the element of the murder case as alleged in Petitioner's indictment that required the State to prove beyond a reasonable doubt that the defendant either caused the victim's death or committed an act clearly dangerous to human life that caused her death. In his petition for discretionary review, Petitioner posed three grounds for review. The first and second grounds for review were:

1. In a murder case, where there is no body, no direct evidence of a death and no direct evidence to show that Petitioner acted either intentionally or knowingly in causing the alleged victim's death or

acted with intent to cause serious bodily injury and committed an act clearly dangerous to human life that caused the alleged victim's death, must the State prove a "fatal act of violence" in order to convict a person of murder?

2. The Court of Appeals erred in finding the evidence sufficient to support Petitioner's conviction for murder when the State failed to prove beyond a reasonable doubt that the alleged victim was deceased and that her death was caused by a criminal act of Petitioner?

By affirming the opinion of the Court of Appeals and finding the evidence sufficient, the Court of Criminal Appeals has totally rewritten the basic principle of criminal law which mandates that the State must prove the elements of the offense as alleged in the indictment before an accused can be convicted of a criminal offense. In Petitioner's case, there was no evidence adduced that Petitioner committed an act that caused the alleged victim's death (*actus reus*), nor was there any evidence adduced that if there was such an act that at the time of its commission Petitioner was acting with the requisite culpable mental state (*mens rea*). By it's opinion today, the Court of Criminal Appeals is rewriting the law, deleting key elements of the offense of murder and lowering the State's burden of proof. The ramifications of this opinion will be far-reaching and not in a good way.

PRAYER

Petitioner asks the Court to grant rehearing, and reinstate discretionary review of this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion for rehearing contains 3,495 words, as calculated by the word count function on my computer and is prepared in Times New Roman 14 point font.

/s/ Linda Icenhauer-Ramirez
LINDA ICENHAUER-RAMIREZ

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Motion for Rehearing was e-served to the Travis County District Attorney's Office and the office of the State Prosecuting Attorney on this the 12th day of July, 2018.

/s/ Linda Icenhauer-Ramirez
LINDA ICENHAUER-RAMIREZ